

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. WEBXITES, LP, Respondent.	DOCKET NO. FCU-04-56
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**ORDER DOCKETING FOR FORMAL PROCEEDING AND
SETTING DEADLINE FOR RESPONSE**

(Issued December 23, 2004)

On November 19, 2004, pursuant to Iowa Code §§ 476.103 and 476.3, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for a proceeding to consider a civil penalty for an alleged cramming violation committed by WebXites, LP (WebXites). Based upon the record assembled in the informal complaint proceedings, the events to date can be summarized as follows:

On October 5, 2004, Mr. Steve Cooley of Cooley Auto Sales (Cooley Auto) of North Liberty, Iowa, submitted a complaint to the Board alleging that the local phone bill for Cooley Auto included unauthorized charges submitted by Enhanced Service Billing, Inc. (ESBI), on behalf of WebXites. Mr. Cooley and Mr. Gary Bontrager, an

employee of Cooley Auto, indicated in the complaint that Cooley Auto received an unsolicited phone call about website development. Mr. Bontrager stated that he was asked if the caller could send some information. Mr. Bontrager stated that he told the company that he could not make the decision and would have to show the information to Mr. Cooley. Mr. Bontrager stated that he was told to answer an automated survey and that someone would return to the line to answer questions. Mr. Bontrager stated that the connection went dead after a couple of questions and that Cooley Auto did not receive any correspondence from the company after the phone call. The complaint stated that in contacting the company to ask about the charges, Mr. Cooley was told that there was a recording of the conversation. Mr. Bontrager characterized the recording as "dubbed," as it contained statements that were not part of the conversation he had. Attached to the complaint was a copy of a bill showing charges submitted on behalf of WebXites in the amounts of \$49.95 for "gold setup" and \$49.95 for "gold mo fee."

Board staff identified the matter as C-04-220 and, pursuant to Board rules, on October 6, 2004, forwarded the complaint to WebXites for response within ten days. WebXites responded to the complaint by e-mail on October 15, 2004. The response included a copy of the third-party verification recording, a copy of a welcome letter WebXites claims it sent to Cooley Auto by fax, and a copy of a letter to Mr. Cooley dated October 14, 2004. In the letter, WebXites stated that it canceled service effective October 4, 2004. WebXites stated that an independent third-party

verification was conducted August 4, 2004. According to WebXites, this authorization contained an agreement to review the terms of sale and was accepted by Mr. Bontrager. WebXites also stated that it contacted Cooley Auto on August 5, 2004, to verify "authentication" prior to sending the welcome package. WebXites stated that it was issuing a credit for fees in the amount of \$49.95.

On October 18, 2004, Board staff forwarded a copy of the recording to Cooley Auto for Mr. Bontrager's review. In a letter dated October 27, 2004, Mr. Cooley and Mr. Bontrager indicated that it is Mr. Bontrager's voice on the recording but that Mr. Bontrager's recollection of the conversation is different than what is on the recording. Mr. Bontrager and Mr. Cooley stated that the recording does not include Mr. Bontrager's statements that he was not prepared to make and could not make a decision about website services. According to Mr. Bontrager, "the agreement" was never played, and the disclaimer regarding the "confirmation of agreement" and the question purporting to establish him as the decision maker did not occur. Mr. Bontrager and Mr. Cooley also stated that clicks can be heard on the recording.

On November 9, 2004, Board staff issued a proposed resolution concluding that the recording provided by WebXites is not proof of authorization because of the unanswered question of tampering. Staff noted its concern about the click sounds between questions and answers, and stated that WebXites' response did not resolve the concern that the recording may have been altered. Staff concluded that the WebXites charges were cramming. Staff directed WebXites to provide a full refund to

Cooley Auto and to indicate the full amount of refund to staff in writing by November 23, 2004.

In its November 19, 2004, petition, Consumer Advocate asserts the proposed resolution should be augmented with a civil penalty because credits alone will not stop the unlawful practice. Consumer Advocate asserts that civil penalties are necessary to ensure compliance and deter future violations.

WebXites responded to the proposed resolution on November 30, 2004, apparently disputing the proposed resolution but indicating that it would reimburse Cooley Auto for remaining charges. WebXites has not responded to Consumer Advocate's petition.

The Board has reviewed the record to date and finds there is sufficient information to warrant further investigation into this matter. The Board will delay establishing a procedural schedule and allow WebXites an opportunity to respond to the allegations raised in Consumer Advocate's petition.

IT IS THEREFORE ORDERED:

1. The "Petition for Proceeding to Consider Civil Penalty" filed by the Consumer Advocate Division of the Department of Justice on November 19, 2004, is granted. File C-04-220 is docketed for formal proceedings, identified as Docket No. FCU-04-56.

2. WebXites, LP, is directed to file a response to Consumer Advocate's petition on or before January 21, 2005.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 23rd day of December, 2004.